Duta Arif Sdn Bhd & Ors v Chartered Development Sdn Bhd & Ors

HIGH COURT (KUCHING) — SUIT NO 22–59 OF 2003-II
SANGAU GUNTING J
5 APRIL 2012

Civil Procedure — Judge — Application to recuse judge — Judge struck off plaintiff's action in absence of plaintiff and its advocate — Whether action by judge reasonable or in error — Whether striking out due to plaintiffs' counsel's repeated absence from attending proceedings — Whether recusal application baseless

The plaintiffs had applied for the judge hearing the instant case ('the judge') to recuse himself from hearing the action and all interlocutory applications connected with it. The recusal application followed the judge's decision ('the ex parte order') to strike out the plaintiffs' writ of summons, statement of claim and notice of motion ('NOM') for summary judgment in the absence of the plaintiffs and their advocate. The ex parte order was made after several adjournments of the first hearing date and during all those adjournments the plaintiffs' advocate had failed to attend the proceedings. The plaintiffs took issue with the fact that although they had faxed a letter to the senior assistant registrar requesting the hearing on the first hearing date to be stood down to a later time, the court nevertheless proceeded at the originally scheduled time in the absence of the plaintiffs' counsel. The recusal application alleged that the fact of the absence of the plaintiffs' counsel was not mentioned in the notes of proceedings ('NOP') of the first hearing date and this omission rendered the NOP 'inaccurate' and 'untruthful' and showed bias on the part of the judge. The application also alleged the judge would be biased against setting aside the ex parte order — the plaintiffs had not only applied to set aside the ex parte order but had also filed an appeal against it — and, as such, he should be recused from further hearing the matter or any interlocutory applications connected with it.

Held, dismissing the application:

(1) The reason why the delivery of the ruling concerning encl 56 and the hearing of the NOM were proceeded with at the adjourned hearing date notwithstanding the absence of plaintiffs' advocate was because the court found the plaintiffs' advocate's request for further adjournment of the proceedings to be unreasonable (see para 32).

(2) With regard to the NOP, there was nothing to indicate that at the material time the judge knew of the plaintiffs' solicitor's letter allegedly

faxed to the senior assistant registrar requesting the time to be re-scheduled. In any case, the plaintiff's lawyers had more than ample time after getting hold of the NOP on that very same morning to have inquired with the relevant court staff and/or officers and even the judge himself as to any serious complaint regarding the contents of the NOP and, if necessary, asked for immediate clarification and/or rectification. Raising the issue of the NOP before the judge for the first time in the recusal application after a lapse of six months made the task of recalling and ascertaining the precise details of what had transpired on the first hearing date very difficult (see paras 15, 21–22).

(3) In the circumstances it appeared very likely to be seriously misconceived, if not also tainted with hasty pre-judgment, the conclusion on the part of the plaintiffs and their lawyers that based on the NOP the judge was unconsciously or consciously biased (see para 19).

(4) It could not be said that the plaintiffs were deprived of the opportunity to be heard just because on the first hearing date the court proceeded with the video conferencing as scheduled. This was because the hearing on that date was adjourned and the plaintiffs had more than ample time during the several adjournments of the matter thereafter to have done whatever they deemed necessary (see paras 25–29).

[Bahasa Malaysia summary

Plaintif-plaintif memohon untuk hakim yang mendengar kes ini ('hakim') untuk menarik dirinya daripada mendengar tindakan dan kesemua permohonan interlokutori yang berkaitan dengannya. Permohonan menarik diri tersebut mengikut keputusan hakim ('perintah ex parte') untuk membatalkan writ saman plaintif-plaintif, pernyataan tuntutan dan notis usul ('NU') untuk Penghakiman ringkas dalam ketiadaan plaintif-plaintif dan peguam-peguam mereka. Perintah ex parte dibuat selepas beberapa penangguhan tarikh pendengaran pertama dan semasa kesemua penangguhan tersebut peguam-peguam plaintif-plaintif gagal untuk menghadiri prosiding. Plaintif-plaintif berhujah walaupun mereka telah menghantar faks surat kepada timbalan pendaftar kanan memohon pendengaran ke atas tarikh pendengaran pertama dipindahkan ke hari yang lain, mahkamah walau bagaimanapun meneruskan pada masa yang asalnya dijadualkan dalam ketidakhadiran peguam plaintif-plaintif. Permohonan menarik diri mendakwa bahawa fakta ketidakhadiran peguam-peguam plaintif-plaintif tidak dikemukakan di dalam nota-nota prosiding ('NP') tarikh pendengaran pertama dan ketinggalan ini menyebabkan NP 'inaccurate' dan 'untruthful' dan menunjukkan berat sebelah oleh pihak hakim tersebut. Permohonan juga mendakwa hakim tersebut akan menjadi berat sebelah terhadap pengetepian perintah ex parte — plaintif-plaintif bukan sahaja memohon untuk mengetepikan perintah ex parte tetapi juga order memfailkan rayuan terhadapnya — dan, oleh itu, dia boleh menarik diri daripada selanjutnya

mendengar perkara tersebut atau apa-apa permohonan interlokutori yang berkaitan dengannya. A

Diputuskan, menolak permohonan:

(1) Sebab mengapa pemberian perintah berkenaan lampiran 56 dan pendengaran NU diteruskan pada tarikh pendengaran penangguhan walaupun ketidakhadiran peguam-peguam plaintif-plaintif adalah kerana mahkamah mendapati permohonan peguam-peguam plaintif-plaintif untuk penangguhan selanjutnya prosiding adalah tidak munasabah (lihat perenggan 32). B C

(2) Mengenai NP, tidak terdapat apa-apa untuk menunjukkan bahawa pada masa material hakim tersebut mengetahui yang surat peguam-peguam plaintif-plaintif yang didakwa difakskan kepada timbalan pendaftar kanan memohon masa untuk dijadualkan semula. Walau bagaimanapun, peguam-peguam plaintif-plaintif mempunyai banyak masa selepas mendapatkan NP pada pagi hari yang sama untuk membuat pertanyaan dengan kaki tangan/pegawai-pegawai mahkamah yang relevan dan mungkin hakim itu sendiri, terhadap apa-apa aduan yang serius berkenaan isi NP dan, jika perlu, meminta untuk penjelasan dan/atau pembetulan segera. Membangkitkan isu NP di hadapan hakim tersebut untuk kali pertama di dalam permohonan penarikan diri selepas selang enam bulan membuatkan tugas mengingati dan memastikan butir-butir terperinci mengenai apa yang berlaku pada tarikh pendengaran pertama adalah sangat sukar (lihat perenggan 15, 21–22). D E

(3) Dalam keadaan ini ia tidak mungkin menjadi salah tanggap yang serius, jika tidak dicacatkan dengan pra-penghakiman yang terburu-buru, kesimpulan oleh pihak plaintif-plaintif dan peguam-peguam mereka bahawa berdasarkan NP, hakim tersebut secara tidak sedar atau sedar berat sebelah (lihat perenggan 19). F G

(4) Ia tidak dapat dikatakan bahawa plaintif-plaintif dinafikan dengan peluang untuk didengar hanya kerana pada tarikh pendengaran pertama mahkamah meneruskan dengan persidangan video seperti yang dijadualkan. Ini adalah kerana pendengaran pada tarikh tersebut ditangguh dan plaintif-plaintif telah mempunyai masa yang banyak semasa beberapa penangguhan perkara tersebut selepas itu untuk membuat apa-apa yang perlu dibuat (lihat perenggan 25–29).] H

Notes

For cases on application to recuse judge, see 2(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 4399–4410. I

Cases referred to

Hock Peng Realty Sdn Bhd v Ting Sieh Chung [1999] MLJU 486, HC (distd)

Legislation referred to

Rules of the High Court 1980 O 92 r 4

Tai Choi Yu (Tai Choi Yu & Co, Advocates) for the plaintiffs.
Sunny Si (Si & Associates) for the first defendant.

Sangau Gunting J:

[1] Enclosure 761 is the plaintiffs' application dated 24 November 2011 made pursuant to O 92 r 4 of the Rules of the High Court 1980. It seeks an order 'that the learned High Court Judge, Y.A. Tuan Sangau bin Gunting, disqualify *himself and/or alternatively that be recused from hearing this action and all the interlocutory applications in relation thereto* and for costs. (Emphasis added.) In support thereof, the plaintiffs list eight grounds presumably in addition to those purportedly contained in their affidavit in support affirmed on 23 November 2011 by one Lau Kah Tiew and subsequently filed on 30 November 2011.

[2] Among the grounds are (quoted in toto):

(a) the plaintiffs' solicitor had by letter dated the 24 May 2011 written to the Chief Judge of Sabah and Sarawak complaining of the actions and omissions of the learned High Court Judge, Tuan Sangau Gunting, and had applied for the appointment of another judge to hear this action and all applications thereto. A copy of the said letter is annexed hereto and marked 'A';

(b) the plaintiffs had indicated that they have no confidence in the said judge hearing the action;

(c) the said judge had made an ex parte order dated the 13 October 2011 against the plaintiffs in the absence of the plaintiffs' counsel and/or the plaintiffs and had by the said ex parte struck off the writ of summons and the statement of claim and a motion for summary judgment filed by the plaintiffs;

(d) the plaintiffs had filed an application by summons in chambers to set aside the said ex parte order and to re-instate the said motion;

(e) the said judge will be influenced by his said ex parte order dated the 13 October 2011;

(f) being so influenced, the plaintiffs will be prejudiced if the said judge hear this action which is equivalent to setting aside his own ex parte order and will therefore be in breach of the second rule of the established elementary rule of natural justice of *nemo judex in causa sua* ie no man may be judge of his own cause;

(g) in the interest of justice, even if the said judge claims that he is not or will not be so influenced by his past decision or decisions, justice will be seen to be done if a new and/or independent judge is appointed to hear this action as the maxim goes; justice must not only be done but also be seen to be done;

(h) that in the interest of justice another judge should hear this action and all applications thereto in view of the danger or likelihood of bias of the said judge; and

(i) further grounds are contained in the affidavit in support to be affirmed by Lau Kah Tiew of the application for disqualification and/or recusal herein and to be filed in due course.

THE PLAINTIFF'S APPLICATIONS AND THE APPLICATION WHICH OUGHT TO BE HEARD FIRST

[3] Concerning this court's order dated 13 October 2011 that the judgment in default of appearance dated 10 July 2003 be set aside and the writ of summons and statement of claim be struck out, the question arises whether, in any case, it is proper for the plaintiffs to have filed in an application for a 'stay'. The fact that the plaintiff has already filed a notice of appeal dated 3 November 2011 against the said order appears to have further amplified this issue.

[4] Viewed from a slightly different perspective, the issue would appear to be: whether the plaintiffs SIC (stay) is intended to apply for an order to stay presumably the execution of the order dated 13 October 2011 (setting aside the High Court order dated 10 July 2003 and the striking out of the writ and SOC dated 5 June 2003), and whether, at the same time, it is also intended to apply for an order to reinstate the NOM.

[5] If the answer is in the positive, whether the said application of the plaintiff substantially, if not wholly, constitutes an abuse of court process (in the words of the first defendant's counsel) 'given that the plaintiff has filed Notice of Appeal on 03.11.2011, *inter alia*, against the Order dismissing P's NOM [End.738]'? Anyway, in the circumstances, it would appear appropriate, that the recusal application be heard first. The application appears to be that I recuse myself from further hearing the instant suit and any interlocutory application in respect thereto.

THE RECUSAL APPLICATION

[6] The immediate question that arises appears to be, whether in view of the

plaintiff's application, and considering both parties' affidavit averments and submissions, I ought to recuse myself from hearing the plaintiff's application for a 'stay'. It would appear, the answer to that question would depend substantially, if not wholly, upon the issues to be adjudicated and the facts and circumstances as well as perhaps the legal principles, upon which the said issues are to be decided. In this connection, it would have to be remembered, that in the context of the plaintiff's recusal application, the core issue would appear be whether, notwithstanding the relevant affidavit averments of the plaintiff pertaining thereto, it would still be possible for me to decide firstly, the stay application itself and thereafter the said 'stay' application, strictly on each application's respective merits.

[7] Anyway, the plaintiff's application for me to recuse myself from further hearing the instant suit and any interlocutory application related thereto, appears to be anchored substantially on the plaintiff's advocate's letter exhibited as 'A' dated 24 May 2011 ('exh A') addressed to YAA the Chief Judge of the High Court of Sabah and Sarawak. It would appear that by exh A, the plaintiff in substance tries to convey that in the conduct of, in any case, the 23 May 2011 proceeding pertaining to the instant suit, I was either 'unconsciously' or 'consciously bias', and that I had 'no respect for details and truth of the facts recorded in the notes of proceedings'.

Letter dated 24 May 2011, exh 'A'

[8] By the said letter dated 24 May 2011 ('exh A'), the substance of what the plaintiff's counsel says therein appears substantially reflected in the following portion of that letter: '… a judge who takes little interests or effort to record the Notes of Proceedings with truthful details will not be able to give a fair or impartial Judgment as the facts which he believe (sic) to be true are untrue or that the facts as set out or known to him in the records are not 100% true and correct.'

[9] Concerning why a copy of exh 'A' was not at the time of transmission extended to the judge referred to therein being the focus of the complaint letter, apparently the plaintiff's advocate himself found it necessary to raise 'special circumstances', referring to a Sibu High Court Case No 22–29 of 1996 (*Hock Peng Realty Sdn Bhd v Ting Sieh Chung* [1999] MLJU 486) (see p 2, bottom para of exh 'A').

[10] Now, merely stating the fact that the said Sibu case was still pending disposal as at the date of exh 'A' to indicate, perhaps, the plaintiffs' concern of the possible ramifications of extending exh 'A' to the judge would, in the circumstances, appear quite understandable. But, for reasons best known to the plaintiffs' advocate in the instant case, he went further by making the comment

concerning the Sibu case on p 3 of the said complaint letter, exh 'A', 'The hearing of the Sibu High Court Suit No. 22-29-1996 spanned a period of several years and it was a tortuous experience'.

[11] To begin with, the Sibu case referred to in exh A is entirely different and separate from the instant case. Then, there is the aforementioned vis a vis the recusal application totally off — tangent comment by the learned solicitor about the Sibu case. The aforesaid comment concerning the Sibu case clearly has nothing whatsoever to do with the instant recusal application. Further, the making of that comment was not accompanied by even the rudimentary facts and circumstances concerning the disposal of the said Sibu case — for instance contribution, if any, to the alleged delay and/or the purported 'tortuous' experience by the defendant and/or his solicitor themselves in that case (who is the plaintiffs' solicitor in the instant case). These were not included in the letter to enable the intended readers to form a more balanced view.

[12] It would have been, in any case, commensurate with the very basic sense of fairness to have also let the intended readers of exh 'A' know, for instance, that among the reasons for the delay in that case (involving the defendant's counterclaim) was (a) the fact that it was overtaken by events after my transfer from Sibu to Sandakan and thereafter to Bintulu, (b) the numerous requests for adjournments by the involved parties themselves (including the plaintiffs' solicitor in the instant suit who was the defendant's solicitor in the Sibu case), (c) preparation and transmission of the copies of the bulky court documentary exhibits and notes of proceedings, and (d) court postponements due to unforeseen or unavoidable circumstances. But apparently, the plaintiffs' solicitor in the instant case, in all probability for self-serving reasons, thought it fair to include the aforesaid comment without any regard to its relevancy to the recusal application, and without including any facts to indicate a more balanced portrayal of the Sibu case.

[13] In this connection, it is to be noted that a copy of the said complaint letter to YAA the YAA the Chief Judge of Sabah and Sarawak was also extended to the then YAA Chief Justice of Malaysia. One would have thought it quite elementary, the need to refrain from making bare what more if also totally irrelevant comments which could cause adverse consequences on the person or people affected by the statement, unless such a statement is accompanied by the relevant full facts and circumstances. In the circumstances, the making of the aforesaid comment quite clearly smacks of the solicitor, again in all probability for self-serving reasons, hastily putting the cart before the horse, indicating thereby an element of prejudgment on his part.

The recusal application re-focused on

[14] Reverting to the plaintiffs' advocate's complaint concerning the

proceeding relating to instant case, the substance of that complaint seems to be, that the 23 May 2011 notes of proceeding ('NOP') relevant thereto are 'inaccurate' and 'not truthful'. The said alleged inaccuracy and untruthfulness of the NOP which was transcribed by one of the interpreters then on duty appears to have been attributed to my allegedly '(having) no respect for details and truth of the facts recorded in the notes of proceedings', and my allegedly '(taking) little interests or effort to record the notes of proceedings with truthful details …'

[15] Now, a closer look at the relevant circumstances including and particularly the chronology of events surrounding 23 May 2011 seems to reveal, that upon getting hold of the said NOP on that very same morning and prior to the preparation and transmission on the very next day of exh A, the learned solicitor for the plaintiff had more than ample time to inquire from the relevant court staff and/or officers and perhaps from the judge himself as to any serious complaint he might have regarding the contents of the 23 May 2011 transcription of the said NOP, such as glaring typographical errors, and if necessary, ask for immediate clarification and/or rectification. With respect, that would been both the natural and logical reaction upon initial discovery of a serious error, particularly, as seems to be the case in the impugned NOP, in the absence of any satisfactory indication of any certification, and crucially that the said NOP was going to be used as a basis for raising complaints against the judge concerned.

[16] Perhaps, it is pertinent to note, in the plaintiffs' letter (exh A), the complaint of plaintiffs' solicitor's absence being unrecorded. The absence of the plaintiff's solicitor during the video-conferencing is something undisputed, but unfortunately, as matters turned out to be, the transcription does not show this. During the video conferencing, unlike in open court, there was no computer screen for the judge to see what was being at that time transcribed by the interpreter.

[17] The NOP transcription having been obtained presumably by the plaintiff's advocate himself barely an hour after the video-conferencing ended, and due to other cases being attended to by the judge, a copy of the said NOP was then yet to be shown to the judge concerned. Anyway, it seems elementary that a glaring error such as the aforesaid itself ought to have prompted the plaintiffs and/or the plaintiffs' advocate to have procured verification and rectification of the NOP prior to using its contents as a basis of their complaint. Such an action would have been, in any case, consistent with what the learned advocate himself has stated in the complaint letter (exh A), inter alia, '… respect for details and truth of facts …'

[18] Perhaps, to put the allegation of bias into its proper perspective, it

would be pertinent to also note the fact, that the said judge concerned presided over the instant case actually for the very first time on 23 May 2011 ie after his transfer from Bintulu with effect from 1 February 2011 and upon taking over the case among many other High Court 1 cases from YA Justice Datuk Linton Albert. In fact, the 23 May 2011 date was on 23 February 2011 fixed by the then senior assistant registrar when the case was mentioned before her. Superimposed with this background, one wonders how the plaintiffs and/or their advocate could have come up with the following statement in their letter dated 24 May 2011 (exh A): 'Was this impugned Notes of Proceedings recorded for a purpose or deliberate? If no, the said judge was unconsciously bias; if yes, he was consciously bias'.

[19] To begin with, the elusiveness of the phrase 'unconsciously bias' seems self-evident. Then there is the learned solicitor's not making any attempt to ensure the correctness or otherwise of the contents of the said transcribed NOP prior to writing and thereafter transmitting the very next day the said complaint letter dated 24 May 2011 (exh A) to YAA the Chief Judge Sabah and Sarawak, with a copy thereof extended to the then YAA the Chief Justice of Malaysia, although there were glaring reasons and there was more than ample time to do so. In the circumstances, it would, therefore, appear very likely to be seriously misconceived, if not also tainted with hasty prejudgment, the conclusion on the part of the plaintiff's solicitor and/or the plaintiffs, that based on the said NOP the judge concerned was either unconsciously or consciously biased.

[20] Such conclusion on the part of the plaintiff's advocate and/or the plaintiff upon closer discernment, quite clearly was based on an NOP, even a cursory perusal of which ought to have spontaneously evoked on the part of the plaintiff and/or its advocate the immediate necessity to have its contents verified by the appropriate court officers or by the judge himself, especially prior to using the contents thereof as a basis to launch a serious complaint against the judge.

[21] The contents of exh A came to the judge's attention only when it was exhibited in the affidavit in support relating to recusal application. By that time, about six months had lapsed ie from 23 May 2011. This to some extent has made very difficult the task of recalling and ascertaining the precise details of what transpired prior to and during the morning just before the commencement of the 23 May 2011 proceeding via video conferencing.

[22] Pertaining to the transcribed NOP it may be noted, that in any case, there appears to be nothing to indicate, that at the material time the judge knew of Mesrrs Tai Choi Yu & Co's letter dated 18 May 2011 allegedly 'faxed' to the SAR requesting the 23 May 2011 to be re-scheduled to 10.45am

(referred to in 'para 3' of exh 'A'). It is to be noted that, as stated in 'para 2' of 'exh A', concerning that letter dated 18 May 2011 Tai Choi Yu & Co, Advocates 'did not receive any reply'.

[23] Anyway, it seems also pertinent to note here, the possible complications consequential to a request of one of the defendants for the 23 May 2011 proceeding to be by way a video conferencing which would have made time synchronisation and strict adherence to the scheduled time essential to minimise waiting time by other parties using the video conferencing facility. On this aspect, including the purported verbal communications between the court staff and staff of Tai Choi Yu & Co, Advocates and presumably among the court staff themselves, some of which seem to have occurred at the 11th hour vis a vis the video-conferencing, there could have been some miscommunication, and if so, it is very much regretted.

[24] Anyway, and to recap, the actual substance of the complaint of Messrs Tai Choi Yu & Co, Advocates and the plaintiffs appears to be discernible from paras 1–3 of p 2 of exh A (the letter dated 24 May 2011). In the circumstances, notwithstanding the absence of the plaintiffs' advocate, and considered in the context of the directions given by the court at the end of the 23 May 2011 proceeding, the main question that arises would appear to be this: in any case, has any substantial injustice been caused to the plaintiffs and/or their solicitor?

[25] During that 23 May 2011 proceeding, in relation to encl 56 the first defendant's counsel did inform the court of the plaintiffs' 'preliminary objections' alleging, inter alia, the lack of, locus standi, on the part of the first defendant's counsel. In fact, he tendered his submission in reply to the plaintiffs' 'preliminary objections'. In substance, the court *did not* proceed to hear encl 56 *but instead adjourned the hearing* to 7 July 2011 at 2.30pm. Clearly, concerning the core issues pertaining to encl 56 and the plaintiff's 'preliminary objections', it could not be said, that the plaintiffs were deprived of the opportunity to be heard just because on that day 23 May 2011 the court proceeded with the video conferencing as scheduled. Anyway, from 23 May 2011 to 7 July 2011 there was, in fact, about six weeks (42 days) for the plaintiff's advocate and his clients to have done whatever they deemed necessary regarding (a) encl 56, (b) the plaintiffs' 'preliminary objections' and (c) the first defendant's submission in reply.

[26] Subsequently, however, the 7 July 2011 hearing date had to be re-scheduled to 22 July 2011. In addition to the 42 days, there were therefore additional 21 days, totaling 63 days for the plaintiffs and their solicitor to do the necessary concerning encl 56, the plaintiffs 'preliminary objections' and the first defendant's submission in reply tendered on 23 May 2011. The plaintiffs'

solicitor was, however, absent on 22 July 2011. This time the court proceeded to consider the plaintiffs' 'preliminary objections' and it was dismissed.

[27] The court thereafter proceeded to hear encl 56, but the delivery of the ruling in respect thereto was deferred to 17 August 2011 at 9am. Meanwhile, on 1 August 2011 the plaintiff's solicitor filed in a notice of motion dated 1 August 2011 ('NOM') praying for, inter alia, an order, 'that the plaintiffs be given liberty to enter judgment against the 1st Defendant as prayed in the Re-Amended Statement of Claim re-dated 25-07-2003 …'

[28] On 17 August 2011 at 9.30am the plaintiff's advocate was absent. A standing in counsel, however, applied for an adjournment as the plaintiff's advocate 'is overseas for medical treatment' and would be available only 'after 20th August, 2011'. The first defendant's counsel informed the court he would be available only at the end of September 2011. In the circumstances, the case was adjourned to 11 October 2011, ie both the NOM and the delivery of the ruling on encl 56. It would be noted that between 22 July 2011 and 11 October 2011 there were two months and 19 days (about 79 days) for the plaintiff and their solicitor to do whatever they deemed necessary.

[29] On 11 October 11 only the first defendant's counsel was present. For reasons already discussed in my grounds of judgment dated 24 November 2011 concerning encl 56 and encl 738, I proceeded with the delivery of my ruling in respect of encl 56 and with the hearing of the plaintiff's NOM (encl 738), notwithstanding the absence of the plaintiff's advocate. In essence, the reasons are indicated from what I briefly said prior to the delivery of the ruling concerning encl 56 and to hear the NOM (encl 738) on 13 October 2011: 'In the circumstances, especially in view of what transpired on 17.08.2011, particularly on the standing in counsel's implied undertaking to remind the plaintiff's counsel 'to be committed to the next date of hearing' coupled with the unexplained approximately 6 weeks lapse in informing the Court of the plaintiff's counsel's unavailability to attend on 11.10.2011, the contention of learned counsel for the 1st Defendant that the application for adjournment is unreasonable, would appear tenable'.

[30] It would, therefore, appear quite clear from, inter alia, a scrutiny of its contents, that the plaintiff's advocate's having written to YAA the Chief Judge of Sabah and Sarawak the letter dated 24 May 2011 as per 'exh A' of the plaintiff's affidavit in support (encl 763), with respect, could not constitute a sufficient reason why I should disqualify myself and/or that I be recused from hearing 'this action and all the interlocutory applications in relation thereto …'

[31] It seems that the plaintiff's averment, '… I and the other second plaintiffs have no confidence in the said judge hearing this action' is based on

the plaintiff's averments under paras 5.1, 5.2(1)–(8) and 5.3 of the plaintiff's affidavit in support affirmed on 23 November 11 (encl 763). The reasons for proceeding with the hearing of encl 56, and the delivery of the ruling in respect thereof have been given in my grounds of judgment concerning encls 56 and 738 (particularly para 30 onwards).

[32] Anyway, I have stated above the substance of the reasons why this court proceeded with the delivery of the ruling concerning encl 56, and the hearing of encl 738. Perhaps, I would here just reiterate that the reason why the delivery of the ruling concerning encl 56 and the hearing of the NOM were proceeded with on 13 November 2011, notwithstanding the absence of the plaintiff's advocate, was basically because of this court's finding, that the plaintiff's advocate's request for an adjournment of the 11 October 2011 proceeding was, in the circumstances, unreasonable.

[33] The plaintiff avers in para 11 of encl 763, 'In the interest of justice, even if the said judge claims that he is not or will not be so influenced by his past decision or decisions, justice will be seen to be done if a new and/or independent judge is appointed to hear this action as the maxim goes; (sic) Justice must not only be done but also be seen to be done'.

[34] With respect, it ought to be elementary that a judge's mere assurance he or she is not or will not be so influenced by his or her past decision or decisions does not necessarily guarantee that justice would be achieved. It seems the said averment conveniently ignores or overlooks the fact that for every decision, grounds for such decision would invariably be given. The involved litigants could then scrutinise the grounds and see whether or not justice has been done and seen to be done.

[35] In this connection, it may also be pertinent to note, that the legal issues to be dealt with in the pending stay application, which appears to be among the interlocutory applications contemplated by this recusal application, would appear to be sufficiently familiar, having been dealt with in various court decisions. This would make it easier the task of ascertaining whether or not justice has been achieved by a particular decision.

CONCLUSION

[36] It was basically for all the reasons adumbrated above, that encl 763 was dismissed with costs. The aforesaid notwithstanding, it ought to be reiterated what had actually been made quite clear at the end of my brief ruling concerning encl 763: that my decision in respect of the recusal application is

nevertheless without prejudice to my subsequently deciding to have myself recused from further hearing the action and any interlocutory application related thereto.

Application dismissed.

Reported by Ashok Kumar